SUPREME COURT, U. S

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1014

ARTHUR MEISTER and DOROTHY MEISTER,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REHEARING.

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On May 12, 1975, the petition for a writ of certiorari in this case was denied. Petitioners move this Court to reconsider and reverse or modify that decision upon the following grounds:

1. In an attempt to simplify the issues presented in his memorandum opposing issuance of the writ, the Solicitor General focussed attention at such a general level that the fabric of established law was made to appear whole where, in fact, the decision below is discontinuous with accepted legal principles in at least two substantial areas which demand attention and resolution by this Court.

a. In his Memorandum in Opposition, the Solicitor General relied on the holding in **Burdeau v. McDowell,** 256 U. S. 465 (1921), that the exclusionary rule does not preclude the government's use of unlawfully seized evidence when the government had no complicity in its unlawful seizure. However, this is merely to state a legal truism which, contrary to the Solicitor General's implied argument (Memorandum in Opposition, pp. 3-5), petitioners have never contested. The issue raised in this case is what constitutes government complicity; and it is submitted that the Court of Appeals for the Seventh Circuit properly defined that complicity in **Knoll Associates Inc. v. FTC,** 397 F. 2d 530 (1968), and that the Court of Appeals for the Third Circuit should have found complicity here on virtually identical facts,[1] where an employer's papers are stolen by his employee and voluntarily delivered to the government for no purpose other than to provide the government with evidence against the employer. It does not eliminate the conflict between this case and **Knoll** to say that the facts in **Knoll** are clearly distinguishable from those in **Burdeau,** since the facts in this case are also distinguishable from those in **Burdeau,** and on precisely the same grounds. Whereas the incriminating evidence sought to be used in **Burdeau** was discovered only incidentally in the course of a search undertaken by private persons for purely private purposes, both in **Knoll** and in this case, the private searchers were motivated by the sole purpose of discovering usable evidence. Thus, the controlling precedent, relied upon

1. See original Petition at pp. 5-7, 14-15. The complicity of the government is, in fact, much more extensive in this case than it was in **Knoll** since, by its publicly announced and commonly known policy of rewarding informers, the Internal Revenue Service actually invited, and certainly could have foreseen, exactly the kind of private theft which occurred here. (See Petition at pp. 15-18.)

in **Knoll** but rejected here, is not **Burdeau**, but **Gambino v. United States**, 275 U. S. 310 (1927), decided by this Court six years after **Burdeau** and clearly intended to limit its application. The Solicitor General's footnote discussion of **Gambino** (Memorandum in Opposition, p. 6), hardly serves to distinguish that case, but only emphasizes the Solicitor General's failure to address the substantial Fourth Amendment issue raised here.

b. The records seized from petitioners and concededly crucial to the government's case were admitted over a hearsay objection on the grounds that they were identified by petitioners' agent in an independent proceeding to compel their return and suppression. Since such "identification" was a necessary condition to establish petitioners' standing to assert the violation of their Fourth Amendment rights, the lower court's reliance upon that identification to admit incriminating evidence clearly put petitioners to the compelled choice of constitutional rights condemned by this Court in **Simmons v. United States**, 390 U. S. 377 (1968). Once again, the Solicitor General's failure to meet this argument obscured the substantial issue raised. It is clearly not enough for him summarily to conclude that "nothing comparable is involved in the present non-criminal proceeding," (Memorandum in Opposition, p. 7), when this distinction has not prevented this Court and others from holding both Fourth and Fifth Amendment protections available to the civil defendant in a variety of proceedings, including those for the recovery of penalties for tax fraud (See cases cited in Petition at nn. 12, 13 at pp. 25-26).

2. A "legitimate expectation of privacy" is the cornerstone of both Fourth and Fifth Amendment rights. Petitioners here were shown to have such a legitimate expectation of privacy with respect to husband-petitioner's tax

records which were stored in a safe on his business premises and entrusted to his full-time employee only for work on those premises. (See Petition at pp. 18-22.) In **Couch v. United States,** 409 U. S. 322 (1973), this Court explicitly recognized such factors as evidencing "constructive possession" of personal papers and, thus, preserving the Fifth Amendment privilege which ordinarily depends upon actual possession. Nonetheless, the lower court relied upon **Couch** to negate petitioner's claim that his Fifth Amendment rights were not extinguished by the removal of his papers from his offices without his authorization or consent.

This Court has granted petitions for certiorari and consolidated appeals in two cases [2] which deal with this precise question left open by **Couch,** *i.e.,* the extent to which a taxpayer has a legitimate expectation of privacy with regard to his personal business records and may claim a Fifth Amendment privilege to bar their use in evidence against him even though they were obtained by the government from persons other than the taxpayer. Although these cases (**Kasmir** and **Fisher**), involve a transfer of records between client and attorney, the fundamental question is not one of privilege, but whether the taxpayer had a legitimate expectation of privacy and retained constructive possession of his papers within the meaning of **Couch.** This is, of course, the very question involved here; and this Court's resolution of that question could well be determinative of the Fifth Amendment claim in this case and may, further, shed considerable light on the related Fourth Amendment issue. It is urged, therefore, that even if this Court will not now grant the petition for a writ of certiorari, it should reserve final

2. **United States v. Kasmir,** 499 F. 2d 444 (5th Cir. 1974), and **United States v. Fisher,** 500 F. 2d 683 (3d Cir. 1974), *cert. granted,* 43 U. S. L. W. 3416 (Jan. 27, 1975).

determination pending its decision in **Kasmir** and **Fisher** for the limited purpose of retaining the power to remand this case to the Third Circuit, should that be appropriate in light of that decision.

For all the above reasons, it is respectfully requested that this Court either reverse its order denying the petition for a writ of certiorari or, at least, reserve final determination pending its decision in **Kasmir** and **Fisher.**

Respectfully submitted,

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Dated: June 6, 1975.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is being filed in good faith and not for purposes of delay and includes only such arguments as are in accordance with Rule 58(2) of the Rules of the Supreme Court of the United States.

JAMES D. CRAWFORD,
Attorney for Petitioner.

Dated: June 6, 1975.